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ABSTRACT

Fact finding, mediation, and arbitration are three methods of resolving impasses in collective bargaining. All three methods involve the inclusion of a third party in the bargaining process. The mediator suggests avenues along which agreement may be sought, but has no power to compel acceptance of his suggestions. Fact finders have greater power to determine the elements of the situation and recommend solutions, but these recommendations are not absolutely binding. The arbitrator makes recommendations that are legally binding. This document considers the impact of each type of third party involvement in resolving impasses, referring to the literature for elaboration. (Author/PGD)

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The Differences between Mediation, Factfinding and Arbitration

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In an effort to afford public employees an alternative to strike, there has developed experimentation with mediation, fact finding and arbitration. In order to compare, differentiate their advantages and disadvantages, it is necessary to understand collective bargaining. (Streiff, 1969,1) We must accept the fact that collective bargaining has granted power to teachers at the expense of the diminishing authority of school boards and administrators. (Jaffe,1971, 1)

The former method was one of unilateral control, where the administrators were granted full authority and responsibility for making all decisions related to educational services to the local community. When decision-making became bilateral, it was inevitable that there should be disputes between boards and employees over terms of contract. (Garber, Hubbard,1971, 79)

Fact-finding, mediation, arbitration are described as follows in the Cue Book (1978, 61):

Fact-finding: The process of determining facts and information to be used as a basis for recommendations for the resolution of a contract dispute or grievence claim.

Mediation: That form of impasse resolution, usually implemented first, in which a third party meets with the two parties of the dispute, together or seperately, in order to perform a function of catalyst, in order to reach an agreement.

Arbitration: A procedure whereby parties unable to agree on a solution to a problem, (ie, at impasse in a contract negotiation or a grievence proceeding), will be bound by the decision of the third party,

In mediation, the mediator will study the issues and attempt to bring the parties to a voluntary agreement. He has no power or authority, except as an advisor to both parites. His purpose is to reach an agreement satisfactory to both parties. He is not necessarily concerned in how a settlement is reached. He does not care which party gives or takes, as long as the results of his work ends with both parties in agreement. The mediator may request other people to be present at the mediation sessions but he has no authority to require their attendance. He may talk with both parties at once, or he may separate the parties, and work back and forth, between them, as he attempts to move them from their last stated position. He will do whatever he thinks necessary to move them from their positions. His role is that of a catalyst. (Ashby, 1972, 66) If he is skillful enough, he may be able to settle the dispute. (Walter, 1975, 59)

Fact finding is a process, where one or more individuals are asked by the parties involved (very often a legally required step, when mediation has failed) to come in and study the issues and make specific recommendations. This is quite different from mediation, where the mediator hepls the parties to solve their own problems. When the fact finders's report is published and made public information, it is likely that the recommendations will be accepted, though there is nothing binding in the procedure--except that both parties have consented to the procedure. Thus, there is the moral obligation to give the recommendations very careful consideration. The fact finder has much more power and authority than the mediator. The fact finder has the power to subpoena witnesses and to request any evidence he thinks is necessary to assist him in making his decisions. He usually carries the power and authority of the state agency that is responsible in the state. (Ashby, 1972, 6)

The fact finder may attempt to mediate, before going into factfinding,but it is not necessary for either party to agree to continue mediation. Usually, the fact finder will attempt to keep the meetings informal, until he believes he can no longer function in that manner. Both parties should prepare quality reports adequately documented. If this is done carefully, the fact finder can start immediately with information on which both parties will be in general agreement. Both parties will need to be prepared for a rebuttal of the data presented by the other party. Silence may indicate acceptance. (Ashby, 1972, 6)

There are two different ways of classifying the process of arbitration: compulsory and voluntary. In addition, there are two ways of classifying the output of the arbitration process: binding and advisory. If we combine the process and outout, we have four types of arbitration:

1. Compulsory advisory-- the process is required, but the result is advisory only.
2. Compulsory binding-- both the process and the results are binding
3. Voluntary advisory-- the process is not required and the results are not binding.
4. Voluntary binding-- the process is voluntary, but once engaged in, the results are binding. (Ashby,1972, 67)

Arbitration is used most frequently in grievences and impasse procedures. An impartial third party can be most helpful in some cases. Careful consideration should be given as to whether it is desirable to resort to arbitration. If arbitration becomes the only way short of a strike, it is imperative that the intentions of both parties be completely clarified and reduced to written form. (Ashby, 1972, 67)

To see the differences in the three processes, let us examine the powers of the third parties. The mediator has np power to do more than point out areas of possible resolution of the impasse. He can only use persuasion.

The factfinder hears testimony and accepts facts or briefs, data and other evidence. He can only write a report and make recommendations for the resolution of the dispute.

Only the arbitrator can issue an award that is enforcable in court. Although arbitration usually involves but a single arbitrator, some state laws, and many contracts require tripartie arbitration. That means one will represent the union, one the employer, and a neutral chairperson. The advantage of a tripartie board is that it lessens the chance for an arbitrator handing down a decision that may be wholly unacceptable to either party. It provides the parties an opportunity to influence a compromise. The disadvantages are that it is time consuming and costly. The chairperson can complicate this procedure when he tries to mediate a majority opinion. An arbitration clause in a labor agreement that provides for a third party , can be broad or narrow in scope. A broad clause can lead to misuhderstandings, the narrow clause is more beneficial to management, in that it is easier to predict the issues that will go to arbitration. It is best to make arbitration clause as specific as possible, to avoid disputes.

Arbitration is carried out as a "quasi-judicial" proceeding. He, the arbi trator does not meet separately with the parties. He sits as a kind of judge a and hears the testimony of the witnesses. He reviews all the evidence submitte and then he will issue an award. In some states this delegation of decision-making, according to Garber and Hubbard (1971: 48) would need specific laws.

There is also an element of coercion, because a third party will select one of the offers as binding, while there is a guarantee of no compromise. This fails to recognize that both sides have positions of merit. These are ignored because the arbitrator is forced to choose the most desirable option. (Ashby, 1972, 68)

We see that the range of third party involvement varies from getting the bargainers to talk in good faith to the other extreme of actual government intervention. In terms of the role of the third party, a shift may occur away from the substance of the impasse and toward new facts and relationships, because of the presence of the third party. However, the conflict remains and must be resolved.

While conflict can be devastating, it can also be creative. Conflict is a potentially constructive means of clarifying and resolving differences when there is a balance of power; this is Lightfoot's notion of positive conflict. Since the disposition of an issue generally hinges on objective interpretation of written policies, it would appear desirable to leave final judgment on such matters to the experienced, impartial arbitrator, rather than to an individual or group which was partly responsible for the policy in the first place. In the absence of a statute to the contrary, there would be no legal restriction to a board, agreeing beforehand, to abide by the judgment of an impartial, educationally oriented arbitrator with respect to a specific fact situation. It is to be emphasized that such binding arbitration is suggested only as the final step, and not for the negotiating process itself. (Angell, 1977, 55) Such determination should merit serious consideration in the interest of saving time and money, maintaining more efficient school operation and improved employee morale. (Ashby, 1972, 66) Bear in mind that the basic goal is to settle disputes--to come to an agreement.

A brief survey of mediation indicates that the most important thing t to say about it is that it is to be preferred to all other kinds of neutra intervention. It is almost always the first step. This process still affords the parties a chance to make their own agreement. The mediation process is relatively inexpensive, though the time of the mediator is not. However relatively little time may be required. His function is to help both parties to see the logic in the other's demands and to make suggestions for the other to consider. He does not take sides, nor make a public statement concerning the issues, the relative merit of each parties positions or the state of the impasse. Mediation would be impossible if either party viewed the mediator as an ally of the other. Joint selection would avoid this difficulty. (Walter, 1975, 58)

Mediation has been found to be usefulin solving difficult issues that remain unsolved in spite of the efforts of the parties involved. The mediation process is relatively impartial. The mediator is not concerned with which party gives or takes, as long as there is an agreement. He sees no "villans or heroes" only two groups of peoples with problems.(Newman,1977, 334.) His function is to assist not supplant, his goal is to get an agreement. He is not involved with later difficulties that may hinder the administration of the agreement. Each party must accept the responsibility of the final agreement. This is not an exact science but an art. Much depends on the mediator's experience and expertise. While the process of mediation has built in limitations, the results indicate that it has worked just by improving communications between parties, thus leading to a settlement (Ashby,1972, 65)

But if mediation doesn't work, then factfinding can be tried. The implication here is one of preciseness, objectivity, validity-- who can argue with the facts? There is the implication that the neutral party will establish facts and reach a settlement. Factfinding without recommendation tends to rely on the facts alone. This is not always successful. Sometimes this method combines with mediation. What is the use of factfinding? It permits the parties to have the real issues that are separating them exposed, since written and oral testimony are required. Usually, the factfinder is able to separate reality from aspiration, and suggests where the settlement should be. Perhaps, most of all, it provides a way of escape by pointing to his recommendations as being responsible for the settlement.(Walter,1975, 59)

Factfinding with recommendations is the most effective. The hearings are formal and each side presents its testimony to the factfinder. Success or failure comes when the parties accept or reject his recommendations. Sometimes the point of final recommendation can be combined with mediation in order to get an acceptable settlement. The authority to make the facts public, is another weapon for him. (Carlton,1969, 19)

The cost of factfinding is usually shared by both parties. It is likely to be abused if paid by the public. Many authorities contend that factfinding should be an open-ended technique for dealing with bargaining impasse, instead of using arbitration. They argue, that while mediation and factfinding are logical extensions of the bargaining

process, and the most satisfactory substitute for the strike, compulsory arbitration adds a new and undesirable dimension to the settlement process. Many believe that it destroys collective bargaining because of the forced choice. Arbitrators may fail to note that both sides have merit and their positions should have equal consideration. "This is an unacceptable dilemma, when applied to a school board situation." (Frankiewicz, Croft, 1978, 10)

Since strikes by public employees are unlawful in most states, it would seem feasible though to use binding arbitrarion. However, this procedure has certain fatal limitations when viewed from the perspective of a public employer and employee. The first limitation is that of delegating to a non-elected third party the power that has been granted to public bodies -- to legislate the terms and conditions of a contract. (Perry,1970) In some states this would be illegal . However, there is a tendency to have more rapid agreement if the possibility of using third party intervention exists. (Cresswell,1974) Another limitation is the danger of the arbitrator to exceed his limits. The placing of limits on arbitrators' authority has legal advantage because it tends to foreclose claims of unlawful delegation of authority when either party sues to overturn the award.

Other possible disadvantages are the increased cost, confusion regarding his role, more formal procedures . (Angell,1977,12) "The primary or only compensatory benefit is its promise of rational approaches to issues and continuity of service, both of which have strong appeal in public education."(Perry,Wildman,1970, 92)

My choice for thied party intervention would be the use of mediation for the settlement of disputes. One of the reasons for this choice of third party intervention is that mediation is an attempt to bridge the gap when there is a breakdown in the negotiations. It assumes that the two parties still want to reach an agreement, but are having difficulty doing so. It also, assumes that an outside party can interact with both in such a way as to gain their confidence and thus be able to provide counsel to each. The basic supposition is that both sides want the welfare of the student as being the deciding factor.

Another reason for choosing mediation is the method of selection. The mediator is selected jointly. Where laws require mediation, the parties must inform some agency that an impasse exists. Another advantage is that the mediator meets independently with each party. The main reason for using mediation is the voluntary nature of the resulting agreement. Neither of the parties commits more than it feels acceptable. Both have merely been assisted in doing what they wanted to do. (Walter, 1975, 58)
An impasse is a crisis. There is no panacea for the solution, but there is increasing evidence that a third party can be effective in reaching an agreement.
In mediation, the parties are not deprived of their responsibility to reach a final agreement as they would be in binding arbitration. In mediation, both parties have agreed that the mediator may act in that capacity, while in arbitration this is not

the case. The very nature of collective bargaining blends into mediation, since both require compromise . The use of mediation would eliminate the feeling that the ultimate victory would be the decision of a third party rather than at the negotiating table. The unique relationship that exists between boards, teachers and the community is recognized and taken into account when mediation is used. This technique results in a workable, peaceful solution. It is flexible enough so as to bring about settlements that are agreeable to both parties.

Factors that might prevent its implementation would probably be the characteristics that make it so attractive as a means of settling disputes. Consideration should be given to the choice of the mediator and to the availability of the one chosen. Some Difficulties may be encountered regarding the choice and availability of mediators, and in deciding which method to use--one mediator or simultaneous participation by two or more. In choosing mediators should they have demonstrated that they are fair, impartial,proven effective in similar circumstances or should a chance be taken on an inexperienced mediator, who might be less expensive, but might make the situation worse? On what other basis should they be selected? Streiff maintains that the following understandings should also be present : mutual commitment to the best education of children; mutual respect for each other; mutual willingness to abide by a process of reasoning in attempting to reach an agreement; mutual rejection of the use of force or power during the process; mutual understanding that concessions may need to be made by the parties concerned. Other difficulties that may arise would be efforts to cast

the whole relationship into a strict private sector labor-management framework, the inexperience of negotiators on both sides of the table, unreasonable demands and counter-offers and narrow definitions of what is negotiable. Other important factors that may impede the implementation would be the status of negotiation in terms of issue differences and the attitude of both parties as related to the potential success of mediation.

No matter how great the spirit of mutual understanding at the time of the agreement signing, nor how concise and clear the language, there will be instances where the interpretation will lead to serious impasse. The organizational problems stem from the fact that bargaining is a power relationship of which compromise is the essence. (Wildman, 1969) There has been a rapid rise of third party efforts to resolve impasse. Sometimes it is the courts, at other times arbitrators, mediators, citizen's advisory committees and other experts.

A perusal of recent literature indicates that state legislatures have shown interest in new ways to prevent strikes by public school teachers. (Duncan, 1979, 128) Most prominent being considered is final and binding arbitration, using some variety of the "last best offer process." Iowa, Wisconsin, and Connecticut use arbitration procedures. In Wisconsin, arbitration is "all or nothing." The mediator--arbitrator must accept one's party offer in its entirety, he cannot split down the middle. This may be to the detriment of public employees. So far the unions have won the majority of cases. This is not a guarantee against strikes in the case of the more militant bargaining unit. (Riley, 1979)

Strike deterent is the strongest argument put forward for binding arbitration. There seems to be a widespread interest in this technique. Opponents of compulsory arbitration argue that it has no place in the public sector since it results in power being taken from the people. They argue that there is nothing to prevent teachers from going on strike if they don't agree with the decision. (Duncan, 1979, 128)

In conclusion, we see that arbitration has an element of coercion, factfinding prolongs labor disputes (Lieberman, 1979, 166) so that mediation lends itself best to the settlement of disputes, as it is considered to be an extension of the collective bargaining process itself.

Since mediation is not a precise science, there are bound to be variables that would influence the choice of this method. The aim is to promote progress by the parties themselves. The timing sequence is important and the various innovative techniques on the part of the mediator will hasten the whole process. In spite of these limitations, the results indicate that mediation has worked as an aid to the resolution of collective bargaining impasse by the mere fostering of communications between the parties which opens up the way to settlement.

Currently there is a movement to avoid unions altogether. The "Pro-Management" technique is being used in some districts. The "Pro-Managment" technique (Yehle, 1980, 22)"aims to make management more responsive to employees' concerns so that unions will have no foothold in your schools." This is perhaps a good solution, especially when it demonstrates that management has the teacher's best interests at heart, and the savings would be worth it. When there is a union, the relationship

is usually as adversaries. Pro-Management works in the Dallas Independent School District, Pasadena, Texas and in the Clovis Unified School District near Fresno, California.

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